In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-806

A. BURTON HANKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

CASES

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The Brief for the Respondents in Opposition substantially ignores the significant Fifth Amendment argument that makes the "contempt" issue imperative for review upon certiorari. The "Questions Presented", as set forth in the Government's brief, ignore completely the most important issues and the brief itself exemplifies the age-old technique of sublimating those matters which the brief-writer cannot answer adequately.

By the simple expedient of compelling a criminal target to explain non-production of portions of records summoned by the IRS, that prospective defendant (who already has signed an agreement extending the statute of limitations on criminal prosecution) is being incarcerated for asserting his rights under the Fifth Amendment. The decisions of this Court simply do not justify the coercive incarceration of a criminal target who is faced with the Hobson's choice of self-incrimination or imprisonment for failure to explain the non-production of records pursuant to an administrative subpoena.

It is inconceivable that the petitioner in this case has fewer rights than a witness responding to a grand jury subpoena, as the Government suggests. (Brief 11, n. 10) In *Curcio* v. *United States*, 354 U.S. 118 (1957), this Court rejected out of hand the Government's argument that a custodian must explain or account under oath for the non-production of documents in order to comply with a subpoena. The Court stated that the custodian "cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." (354 U.S. 124)

At the very least, the District Court should have afforded petitioner a non-incriminatory opportunity to testify *in camera*, subject to full cross-examination by that Court. Compare *United States* v. *Anderson*, 567 F. 2d 839 (8th Cir. 1977). The Government's opposition brief makes no attempt to answer this contention.

In a misguided attempt to shift the burden of proof to petitioner, the Government relies principally on two decisions of this Court (*McPhaul* and *Fleischman*), which were not even cited in either opinion of the Court of Appeals. Both cases are readily distinguishable and will be discussed below.[1]

In the cases relied upon by the Government the records sought by subpoena *duces tecum* were not privileged under the Fifth Amendment, though frivolous privilege claims

1. *McPhaul* v. *United States*, 364 U.S. 372 (1960); *United States* v. *Fleischman*, 339 U.S. 349 (1950). It may be appropriate to note, moreover, that both cases involved subpoenas issued by a Subcommittee investigating un-American activities. Both were decided by five to four margins. Neither case has been squarely challenged or deeply analyzed in any subsequent decision of this Court or any appellate court. The result in the cited cases may reflect, in part, the philosophy of an earlier controversial era.

were raised in some of the lower court decisions. In the instant case, however, the Justice Department attorney conceded in the District Court that the availability of the Fifth Amendment privilege with respect to the records of the two-brother partnership was "clearly a close question of law." (App. I, 70) With regard to the Boswell workpapers the Government admitted (App. I, 64, 66) that any records held by Hankins were privileged under the then controlling opinion of the Fifth Circuit in *United States* v. *Kasmir*, 499 F. 2d 444 (5th Cir. 1974), *rev'd sub nom. Fisher* v. *United States*, 425 U.S. 391 (1976).

Because there were valid legal objections to production of any records, petitioner's counsel justifiably urged the District Court to hold in abeyance the question "whether all the records which have been summoned are in existence." (App. I, 58) Neither the District Court, nor Government counsel, took issue with counsel's position that the issue of "ability to produce" was premature. (App. I, 58-59)

The position taken by petitioner's counsel is supported by cases cited at page 16 of the Petition for Certiorari. Moreover, this was precisely the argument previously advanced by the Government in *United States* v. *Held*, 435 F. 2d 1361 (6th Cir. 1970). There the Government's brief on appeal asserted: (page 58)

> ". . . if some showing of compliance having been made, the question ultimately arises on a contempt citation whether Mr. Held has produced records to the full extent of his ability, it will then and not before be timely to consider whether the evidence then adduced does or does not support such a defence."

Unlike *McPhaul*, the instant case does not involve a failure to produce *any* records following an unqualified, unexplained refusal to produce when requested to do so.

Hankins' answer to the petition seeking enforcement of the summons for the production of the former partnership records contained an *unqualified denial* that he had "possession, custody or control of much of the record material" sought by the IRS summons. (App. I, 338) His verified answer to the petition calling for the production of "estate" records contained an *unqualified denial* that he had possession of any documents pertaining to the estate tax return and settlement of the estate. (App. I, 381, 389)

It simply is not true that petitioner's counsel acknowledged at the enforcement hearing that petitioner was in possession and control of all the records. (Respondent's Brief in Opposition, p. 3) This assertion is based on an inaccurate finding of fact requested by the Government and adopted verbatim by the District Court before a transcript was filed. Counsel admitted only that petitioner had possession of such records *as were in existence when the summonses were served.* (App. I, 59) Because petitioner never denied that he could produce *some records,* the issue should have been reserved for the contempt hearing.[2]

Not only did this petitioner deny ability to comply fully at the enforcement hearing and in the verified pleadings filed therein, *his response to the contempt petition affirmatively asserted that he was unable* "to produce any of the records described as 'missing' " in the Government's pleadings. (App. II, 28) Previously, counsel had unsuccessfully urged the Government to compel the personal appearance of Hankins, as ordered by the District Court. (App. I, 309, 343, 372, 403) Thus, Hankins was precluded from an opportunity to deny ability to produce and to assert

2. With the exception of the 1972 records, which the Government had conceded to be those of a proprietorship, all available documents were in fact produced in response to the enforcement orders.

his Fifth Amendment privilege upon cross-examination, as he was entitled to do under *Curcio* v. *United States,* 354 U.S. 118, 128 (1957); *United States* v. *Patterson,* 219 F. 2d 679 (2nd Cir. 1955); and *Securities Investor Protection Corp.* v. *Executive Securities Corp.,* 433 F. Supp. 474 (S.D. N.Y. 1977).

It is not true, as the Government asserts, that both courts below concluded that "petitioner could comply with" the court's order. (Opposition Brief, p. 9) At the conclusion of the contempt hearing, an Assistant U. S. Attorney requested that the contempt order recite that "the respondent Hankins is in a position to produce the records that are missing." To this, Judge Smith merely replied: (App. II, 107)

> "Well, I just hold that I have previously held that he was in possession of these records in former hearings of this case and that under those conditions, if he does not have the records at this time to produce, it is incumbent upon him to show that."

Previously, the District Court had said, "I just cannot take the unsworn testimony of Mr. Hankins through his attorney that he can't produce them." (App. II, 101) In both opinions, the Court of Appeals merely emphasized the failure of Hankins to present any evidence of his inability to comply.

If petitioner had attached an affidavit, denying ability to produce, to his motion to dismiss the contempt petition the Government would have contended that petitioner had waived his Fifth Amendment privilege. This argument was made by the Government, and rejected by the District Court, in *Groh* v. *Decker,* 72-1 U.S.T.C. ¶ 9410 at pp. 84,408-9 (W.D. Mich. 1971). However, this questionable position subsequently was accepted by the District Court

for the Southern District of New York in an unreported opinion, now on appeal in *United States* v. *O'Henry's Filmworks, Inc., et al.*, 2nd Cir., Dkt. No. 78-6124.

In *O'Henry*, which is scheduled for oral argument on January 26, 1979, the respondent attached an affidavit to his response to the enforcement petition stating:

> "I am not now, nor was I at the time I was served . . . in possession or in control of the documents called for in the summons." (Appellant's Brief, p. 5)

In attempting to support the District Court's ruling that the affidavit was a waiver of the privilege, the Government has filed a brief basically in conflict with its opposition brief in the instant case. For example, the Government's *O'Henry* brief states that this Court in *McPhaul* "simply was emphasizing that an individual cannot treat a Congressional subpoena as an invitation to play 'hare and hounds' by withholding a legitimate explanation for this action until years later, when he is tried for criminal contempt." (p. 23)

McPhaul had been indicted and convicted of the offense of willful failure to comply with a subpoena *duces tecum* of the House of Representatives. When questioned at a Subcommittee hearing, McPhaul gave a flat "I will not" response when asked whether or not he would produce the records. (364 U.S. at 376) In affirming McPhaul's conviction, this Court emphasized that the defendant "never claimed—either before the Subcommittee, the District Court, or the Court of Appeals and he does not claim here—that the records called for by the subpoena did not exist or that they were not in his possession or subject to his control." (364 U.S. at 378)

Because McPhaul never claimed inability to produce, this Court rejected the argument that "the government

failed to show he could have produced the records before this Subcommittee." (364 U.S. at 378) In essence, the case merely holds that the Government need not negative every conceivable defense to production of records that might have been, but in fact was not, raised.

In *United States* v. *Fleischman*, 339 U.S. 349 (1950), the Government had proved beyond a reasonable doubt that the witness had the power jointly with others, if not individually, to bring about compliance with the subpoena. Mrs. Fleischman did not even suggest that she would give her consent to production, or attempt to obtain the consent of the other board members.

The critical factor in *McPhaul*, as the Court below had noted in an earlier case, *United States* v. *Rizzo*, 539 F. 2d 458, 466-467 (5th Cir. 1976), was McPhaul's "failure even to suggest to the Subcommittee his inability to produce" the records in question. (364 U.S. at 379) *McPhaul* plainly indicates that a *mere suggestion* of inability to comply would "put the government to proof on that matter" at a "later contempt trial for failure to produce he records." (364 U.S. at 380)

This Court's concluding comment with respect to the "ability to produce" issue in *McPhaul* was as follows: (364 U.S. at 380-381)

> "Inasmuch as petitioner *neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them*, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time the subpoena was served upon him." (Emphasis added)

This statement reflects the precise holding in *McPhaul* and effectively serves to distinguish the instant case. Indeed, a fair reading of *McPhaul* serves to reinforce petitioner's position that, in a contempt proceeding, the government must shoulder its burden of proving ability to produce by clear and convincing evidence.

Assuming that a contempt finding was appropriate, the Government points to no evidence justifying coercive incarceration, rather than a remedial, compensatory award. In opposing Hankins' motion to dismiss the contempt petition, the Government filed a memorandum *conceding* that it "could offer no proof that Hankins is still in possession" of any "missing" records. (Memorandum in Opposition, p. 5, R. 55; Dkt. No. 77-1967) In the face of this concession, the incarceration order is totally lacking in support.

Moreover, the courts below erred in failing to give appropriate weight to petitioner's denial under oath in verified pleadings in the enforcement action that he was able to produce all of the records, and the Court of Appeals should have taken cognizance of petitioner's sworn denial in the affidavit attached to his Motion for Stay Pending Appeal. See *Hynes* v. *Sloma*, 59 A.D. 2d 1014, 399 N.Y.S. 2d 745, 747 (4th Dept. 1977).

In the Court of Appeals, the Government asserted that incarceration was appropriate, even if the records could not be produced, in order to compel Hankins to "explain his inability to produce." (Appellee's Brief, Dkt. No. 77-1967, p. 46, heading "C") Thus, the Government erroneously argued and the court below apparently agreed that incarceration is appropriate to coerce oral testimony, and not merely to coerce the production of records.

The Government's brief (p. 6) misleadingly characterizes "as isolated statements" the concessions in the District Court that the 1972 records were those of a sole proprietorship. Inspection of the summons as a whole discloses that the Government was demanding only documents for periods ending with the death of Bewell Hankins. (App. I, 475) A review of the District Court's Findings of Fact and Conclusions of Law makes it abundantly clear that the Court intended only to compel production of records prior to termination of the partnership, together with the workpapers for the period ended November 21, 1971. (App. I, 278-279, 295-296)

It is undisputed that petitioner did not produce the 1972 records in response to the court's order. Failure to produce these records was vindicated when the IRS made no subsequent demand for production of the same. The Department of Justice *concurred in this view* when it failed to cite petitioner for contempt with respect to the 1972 records. Finally, the Government conveniently overlooks the fact that the income tax deficiency for 1972 was directed solely to Hankins as sole owner and was computed by using beginning and ending assets of the lumber company business. (App. II, 118, 123, 162)

With respect to the remaining issues in the underlying appeal from the enforcement order, the Government's brief ignores the emphasis in *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976), on the fact that "existence and possession or control of the subpoenaed documents" was not in issue. Here, possession and existence were disputed and Hankins contended that he was not holding any records in a representative capacity. For these reasons, *Fisher* is not controlling and enforcement of the summonses in

this case clearly would involve incriminating testimonial admissions.

For the foregoing reasons and those previously advanced, this Court should grant the Petition for Certiorari. Moreover, petitioner suggests that this matter may warrant a request that the entire record be transmitted to the Supreme Court before action is taken on this Petition.

Respectfully submitted,

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